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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD B. RICE TIRE COMPANY, INC.,
Petitioner,

v.

MICHELIN TIRE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY J. WATERS
ROBERT H. MORSE
GLENN R. REICHARDT
JEFFREY N. MARTIN
PEABODY, RIVLIN, LAMBERT & MEYERS
A Professional Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 457-1000

GEORGE W. SHAFFER
WILLIAM N. ROGERS
SHAFFER & ROGERS
17 West Jefferson Street
Rockville, Maryland 20850
(301) 279-2100
Counsel for Petitioner

July 24, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Manufacturers, in fashioning systems to distribute their products, often opt not only to sell to independent distributors but to act and compete as distributors themselves. At times, the manufacturer-distributor will restrain the competitive activities of its independent distributors, thereby inviting scrutiny under the Sherman Act. Lower court opinions conflict as to the appropriate antitrust standard for reviewing such restraints in a dual distribution context. This case, involving a manufacturer-distributor's termination of a competing independent distributor, presents the following questions:

1. What is the appropriate standard, under Section One of the Sherman Act, 15 U.S.C. § 1, for determining the legality of a restraint of trade resulting from the termination by a manufacturer-distributor of a customer-distributor with which it competes?

2. Should such a restraint be analyzed according to its purpose, as held by the Court below, according to its source, as held by the Court of Appeals for the Fifth Circuit, or according to the competitive relationship of the parties to the restraint, as suggested by the opinions of this Court and held by the Courts of Appeal for the Second and Third Circuits?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Donald B. Rice Tire Company, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Fourth Circuit (App. A, *infra*, 1a-3a) was issued on January 12, 1981, and is reported at 638 F.2d 15. The prior decision and order of the trial court sitting in the United States District Court for the District of Maryland (App. D, *infra*, 6a-28a) is reported at 483 F. Supp. 750.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 12, 1981. (App. B, *infra*,

4a). A timely request for rehearing was denied on April 28, 1981. (App. C, *infra*, 5a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This petition involves a construction of Section One of the Sherman Antitrust Act, 15 U.S.C. § 1 (1976), which, in pertinent part, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

STATEMENT

The petitioner, Donald B. Rice Tire Company, Inc. (hereinafter "Rice"), is an independent tire dealer located in Frederick, Maryland. (App. D, *infra*, 7a). The respondent, Michelin Tire Corporation (hereinafter "Michelin"), is the American component of an international organization that is the world's largest and most experienced manufacturer of radial tires. (App. D, *infra*, 8a). This action arose out of Michelin's termination, in 1977, of its dealer relationship with Rice. (App. D, *infra*, 6a).

Since its origin in 1955, Rice has been a retail tire distributor of numerous brands and types of tires. About 1972, Rice began to engage in large-scale wholesaling of tires to other retail tire dealers, most of which are located in the Baltimore-Washington area. (App. D, *infra*, 7a-8a). During the early 1970's, Michelin encouraged and nurtured the wholesaling activity of Rice and other large Michelin distributors by providing quantity discounts for large volume purchases. (App. D, *infra*, 8a-9a). Between 1972 and 1977, the wholesale portion of Rice's business grew from 25 percent to 80 percent of its total sales. (App. D, *infra*, 7a).

In late 1977 Michelin decided, in conjunction with certain authorized dealers, to eliminate competition from Rice and other aggressive wholesalers, and "to assume primary responsibility for the wholesaling function." (App. D, *infra*, 9a & 11a). At the time of its termination in 1977, Rice was the largest Michelin distributor in the Baltimore-Washington area, and one of the largest Michelin distributors in the nation. (App. D, *infra*, 8a). The District Court found that the terminations of Rice and other aggressive wholesalers threatened "remaining dealers who might contemplate such a [wholesale] sales strategy," and thereby imposed restrictions on the class of customers to which those dealers could sell. (App. D, *infra*, 18a).

By terminating Rice, Michelin eliminated a competing wholesaler that offered authorized Michelin dealers better terms, including price, than were available from Michelin. (App. D, *infra*, 9a). Rice's termination also eliminated the principal source of supply of Michelin tires to many retail dealers in the Baltimore-Washington area to which Michelin would not sell directly. (App. D, *infra*, 9a).

At trial, Rice proved all the pertinent facts that have led other courts to find a horizontal allocation of customers, a *per se* violation of the Sherman Act. The District Court found that Rice had proven the threshold requirement that Michelin engaged in a combination, contract or conspiracy to restrain trade, which restraint was therefore subject to further analysis under Section One of the Sherman Act. (App. D, *infra*, 11a). The District Court further found that the restraint imposed by Michelin "was motivated in large part by Michelin's desire to assume primary responsibility for the wholesaling function." (App. D, *infra*, 9a-10a). These two findings necessarily established that Michelin had engaged in a contract, combination or conspiracy to elim-

inate competition at the wholesale level—a horizontal restraint upon trade.

The District Court acknowledged that horizontal restraints are illegal *per se.* (App. D, *infra*, 12a). However, in a misplaced reliance upon this Court's decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372 (1967), the District Court reasoned "that in a dual distribution system where the manufacturer is both supplier and competitor, the restraints imposed are to be evaluated as vertical because '[t]he *source* of the restrictions is the manufacturer.'" (App. D, *infra*, 12a) (emphasis supplied). Since the restraint upon large-scale wholesaling was imposed by a manufacturer (Michelin), the District Court scrutinized it as a vertical restraint under the Rule of Reason. After an analysis of the Michelin restraint under the Rule of Reason, the District Court concluded that Michelin had not violated the Sherman Act. (App. D, *infra*, 28a).

In its review of this ruling, the Court of Appeals for the Fourth Circuit adopted the findings and conclusions of the District Court, but explicitly rejected "any implication arising from the district court's discussion of *Schwinn* that a restraint may always be regarded as vertical if it is imposed by the manufacturer." (App. A, *infra*, 3a). However, in place of the "source of restriction" test employed by the District Court, the Court of Appeals adopted an equally erroneous "purpose" test for determining whether a restraint is vertical or horizontal:

> . . . we think it is important to distinguish between a conspiracy among dealers and their supplying manufacturer *for the purpose* of retail price maintenance that would benefit the dealers and one involving the same parties but redounding primarily to the benefit of the manufacturer as a result of increased interbrand competition. A restraint imposed by the former conspiracy would be horizontal in

> nature and *per se* illegal, while one imposed by the latter would be vertical and analyzed under the rule of reason. (App. A, *infra*, 3a) (emphasis supplied).

Like the District Court, the Court of Appeals failed to apply established antitrust analysis under which the vertical or horizontal nature of a restraint is determined by the *competitive relationship* of the parties to the restraint. The Court of Appeals reasoned that because Michelin's restraints were for the perceived purpose of promoting interbrand competition, the restraints were *both* vertical *and* not unlawful under the Rule of Reason.[1]

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE LAW OF THIS COURT CONCERNING THE APPROPRIATE METHOD TO DIFFERENTIATE HORIZONTAL FROM VERTICAL RESTRAINTS OF TRADE.

The threshold issue in analyzing a claim under the Sherman Act is whether the particular restraint or activity under review is to be classified as horizontal or vertical. Horizontal restraints allocating customers or territories among companies at the same level of a market are considered illegal *per se*. *E.g., United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). However, vertical customer or territorial restraints, involving com-

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[1] The Court of Appeals failed to apply its own unprecedented "*purpose*" test to the facts of this case. If it had done so, it would have concluded that because the Michelin restraint was, in the words of the District Court, "motivated in large part by Michelin's desire to assume primary responsibility for the wholesaling function," (App. D, *infra*, 9a) its purpose was not to increase interbrand competition, but to eliminate intrabrand competition at the wholesale level. Instead, the Court of Appeals simply ignored the District Court's finding about the purpose of Michelin's restraints and reached its own independent finding that the restraints were "for the *purpose* of promoting interbrand competition." (App. A, *infra*, 3a) (emphasis supplied).

panies at different levels within a chain of distribution, are likely to be scrutinized under the Rule of Reason. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Thus, the classification of a restraint as horizontal or vertical is not only a threshold antitrust issue, but is often determinative of the outcome of a case.

This Court, in *GTE Sylvania*, recognized that "[t]here may be occasional problems in differentiating vertical restrictions from horizontal restrictions. . . ."[2] 433 U.S. at 58 n. 28. These problems are particularly acute in dual distribution systems in which a manufacturer-distributor like Michelin competes with independent distributors such as Rice.[3] A restraint that at first blush might appear to be a vertical customer or territorial restriction, imposed by a manufacturer upon a distributor at a different market level, actually may be a horizontal restriction that impedes competition between firms at the same market level.

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[2] In the recent words of William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, "[i]f there is any major weakness in antitrust doctrine and analysis as it has been applied in recent years, it is the tendency to focus upon general categories of vertical arrangements and behavior without any careful analysis of their horizontal impacts, if any." Baxter, William F., Prepared Statement to the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 4 (Apr. 29, 1981).

[3] The state of the law concerning restraints in a dual distribution context—particularly whether such restraints should be judged as horizontal or vertical—is generally regarded as unsettled. *See* ABA ANTITRUST SECTION, MONOGRAPH NO. 2, VERTICAL RESTRICTIONS LIMITING INTRABRAND COMPETITION 2 n.3 (1977), Altschuler, *Sylvania, Vertical Restraints and Dual Distribution*, 25 ANTITRUST BULL. 1 (Apr. 1980), Jinkinson & Foster, *Per Se Rules Against Vertical Restraints: Down But Not Out*, 58 WASH. U. L. Q. 795, 798 (1980); Note, *Antitrust Treatment of Intrabrand Territorial Restraints Within a Dual Distribution System*, 56 TEX. L. REV. 1486 (1978).

This Court has not articulated an analytical framework for characterizing a restraint on competition within a dual distribution system as horizontal or vertical for purposes of Section One of the Sherman Act. However, in other contexts this Court has found that the vertical or horizontal character of a particular restraint should be determined by reference to the *competitive relationship* of the parties, rather than by the *purpose* or *source* of the restraint. As this Court explained in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 313 (1956) (a case which involved characterization of a restraint within a dual distribution context for purposes of "fair trade" statutes), ". . . the crucial inquiry is whether the contracting parties compete with each other . . . at the same functional level."

This Court also applied a "competitive relationship" test in *United States v. Sealy, Inc.*, 388 U.S. 350, 352 (1967), where this Court concluded that substance, rather than form, should be considered in distinguishing horizontal from vertical restraints.[4] Later in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972), this Court held that a restraint is horizontal if the parties affected by the restraint are "competitors at the same level of the market structure . . . ." *Topco* was reaffirmed in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 57 n.28.

Thus, the "purpose" test adopted by the Court below to distinguish horizontal from vertical restraints con-

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[4] In a June 23, 1981, address to the annual meeting of the District of Columbia Bar, Attorney General William French Smith agreed that restraints which are ostensibly vertical may in fact be horizontal in effect:

> In analyzing any specific vertical arrangement, one must ask whether it has an anticompetitive effect at any identifiable horizontal level. Where vertical arrangements do, we shall seek whatever relief is necessary to eliminate the anticompetitive effects.

flicts with a long line of Supreme Court precedent which makes that distinction turn on the competitive relationship of the parties. Neither this Court nor any other federal court has issued a reported opinion that used "purpose" to determine whether a restraint is vertical or horizontal.

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE LAW IN OTHER CIRCUITS CONCERNING THE LEGALITY OF RESTRAINTS IMPOSED BY A MANUFACTURER IN A DUAL DISTRIBUTION SYSTEM.

In the absence of specific guidance from this Court concerning the proper method to distinguish horizontal from vertical restraints within a dual distribution system, sharp conflicts have developed among the Circuit Courts of Appeal on this issue. The Second and Third Circuits[5] have applied a competitive relationship test to conclude that restraints imposed by manufacturers upon competing distributors in dual distribution contexts are horizontal restraints. On the other hand, the Fifth Circuit and the District Court below have con-

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[5] Pitchford v. PEPI, Inc., 531 F.2d 92, 104 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1253-54 (3d Cir. 1975), *affirming*, 365 F. Supp. 1073, 1092-93 (D.N.J. 1973); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 721-22 (S.D.N.Y.), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969); Copy-Data Systems, Inc. v. Toshiba America, Inc., 1979-1 Trade Cases (CCH) ¶ 62,696, (S.D.N.Y. 1979); United States v. CIBA GEIGY Corp., 1976-1 Trade Cases (CCH) ¶ 60,908 (D.N.J. 1976). The Sixth Circuit has applied a similar test to find that a manufacturer-imposed restraint was horizontal for purposes of the McGuire Act. Rubbermaid, Inc. v. Federal Trade Commission, 575 F.2d 1169, 1174 (6th Cir. 1978).

cluded that such restraints should be analyzed solely as vertical restraints because their "sources" are manufacturers.[6]

The purpose test invented by the Court below is in conflict with *both* of the preceding lines of authority.[7]

The current conflict among the circuits concerning the characterization of restraints as horizontal or vertical may be attributable to the attempt by the lower courts to reconcile *dicta* in this Court's opinion in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), with the analysis dictated by this Court's rulings in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

As described above, *McKesson*, *Sealy* and *Topco* hold that the characterization of a restraint as horizontal or vertical depends upon the competitive relationship of the parties to the restraint. Pages 8-9, *supra*. Unfortunately, some lower courts, including the District Court below and the Fifth Circuit, have misread this Court's opinion in *Schwinn* and erroneously concluded that any restraint

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[6] Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1004-05 (5th Cir. 1981); Donald B. Rice Tire Co. v. Michelin Tire Corp., App. D, *infra*, 12a.

[7] The district courts in the Ninth Circuit have followed yet another approach, under which a restraint in a dual distribution context is viewed as neither horizontal nor vertical, but "as a separate business entity." Krehl v. Baskin-Robbins Ice Cream Co., 1979-2 Trade Cases (CCH) ¶ 62,806, at p. 78,704 (C.D. Cal. 1979). *See* Westpoint Pepperell, Inc. v. Rea, 1980-2 Trade Cases (CCH) ¶ 63,341 (N.D.Cal. 1980) (restraint should be characterized by the "role" in which the manufacturer imposed it).

imposed by a manufacturer upon one of its distributors is a vertical restraint.[8]

For instance, the Fifth Circuit in *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981), recently concluded, based on this Court's decision in *Schwinn*, that a restraint imposed by a manufacturer upon a competing distributor in a dual distribution context was vertical because its source was the manufacturer:

> When the manufacturer is the source, the conspiracy is vertical.

637 F.2d at 1004. The District Court below reached a similarly erroneous conclusion, which the Court of Appeals below corrected:

> We must reject, however, any implication arising from the district court's discussion of *Schwinn* that a restraint may always be regarded as vertical if it is imposed by the manufacturer. (App. A, *infra*, 3a).

From a comparison of the two quotations above, it is obvious that the Fourth and Fifth Circuits—in opinions issued within a few weeks of each other—have reached opposite conclusions about the implications of *Schwinn*,

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[8] This Court's opinion in *Schwinn* contains the ambiguous statement that:

> We are here confronted with challenged vertical restrictions as to territory and dealers. The source of the restrictions is the manufacturer.

388 U.S. at 372. From an analysis of the lower court opinion in *Schwinn* and of Justice Stewart's concurring opinion, it is clear that the language quoted above was intended to be a simple statement of fact *and not* a rule of law that restrictions whose source is the manufacturer are necessarily vertical restraints. United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 343 (N.D. Ill. 1965); 388 U.S. at 390-91. This Court's reference to the fact that the manufacturer was the "source of the restrictions" was only intended to distinguish those particular restrictions from other restraints of a horizontal nature which had been considered by the lower court but were not before this Court on appeal. *See* 388 U.S. at 368, 377.

and its purported "source" test, for the characterization of restraints as horizontal or vertical.

The decision of the Court below also conflicts with the opinions of the Second and Third Courts, which have followed this Court's analysis in *McKesson* by determining the character of restraints imposed by manufacturers in dual distribution systems according to the competitive relationships of the parties to the restraints. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1254 (3d Cir. 1975) (citing *McKesson*); *Interphoto Corp. v. Minolta Corp.*, 295 F.Supp. 711, 718 n.2 (S.D.N.Y.), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969) (citing *McKesson*). The rule in these circuits is that if a manufacturer restricts the competition it faces from independent distributors, the restraint will be considered horizontal and unlawful *per se*. *See American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1253-54 (3d Cir. 1975), *affirming*, 365 F. Supp. 1073, 1092-93 (D.N.J. 1973); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711, 718 n.2, 720-21 (S.D.N.Y.), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969); *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 1979-1 Trade Cases (CCH) ¶ 62,696 (S.D.N.Y. 1979) (relying upon *Interphoto*).

Other courts outside the Second and Third Circuits have similarly characterized restraints imposed by manufacturers upon competing distributors as horizontal. For example, in *Rubbermaid, Inc. v. Federal Trade Commission*, 575 F.2d 1169, 1174 (6th Cir. 1978), the Sixth Circuit held that a manufacturer's imposition of restraints on independent wholesalers, to prevent them from selling to non-authorized retailers, was a horizontal restraint (for purposes of the McGuire Act) because the manufacturer also operated as a competing wholesaler. *See also Guild Wineries & Distilleries v. J. Sosnick & Son*, 102 Cal. App. 3d 627, 162 Cal. Rptr. 87 (1980).[9]

[9] Until recently, the Fifth Circuit also held that an agreement between a manufacturer and an independent distributor in a dual

By differentiating between horizontal and vertical restraints on the basis of their purpose, the Court below has added to the conflict that exists among the circuits concerning the appropriate framework for analysis of restraints in dual distribution contexts. The Court below did not even consider the applicability of the widely accepted competitive relationship test prescribed by *McKesson* and it expressly rejected the *Schwinn* "source" test recently applied by the Fifth Circuit. As a result, the legality of a restraint imposed by a manufacturer upon a competing distributor in a dual distribution system now depends largely upon the judicial circuit within which that restraint is reviewed.

The conflict among the circuits concerning the characterization of restraints in a dual distribution context is ripe for resolution by this Court. Further delay in this Court's review of this issue could create inequities among litigants in different jurisdictions and add to the unnecessary confusion that exists in the wake of *McKesson* and *Schwinn*. Rice respectfully submits that the instant petition presents an appropriate case for fashioning the appropriate framework for analysis of restraints in a dual distribution system.

III. THE DECISION OF THE COURT BELOW WEAKENS THE UNDERPINNINGS OF *PER SE* RULES OF ILLEGALITY UNDER THE SHERMAN ACT.

The decision of the Court below trespasses beyond the dual distribution context to undermine the validity of several *per se* rules that have long been central to anti-

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distribution context was a horizontal restraint of trade. Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 899 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973) (following *Interphoto*). However, the Fifth Circuit's more recent opinion in Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001 (5th Cir. 1981), has raised doubt about the continuing validity of *Hobart Brothers* as a rule of law in the Fifth Circuit. *Id.* at 1005.

trust law, particularly the *per se* rule applicable to resale price maintenance.

This Court created *per se* rules of illegality to avoid complicated and costly inquiries into the alleged purposes or business justifications for certain manifestly anti-competitive restraints upon trade. As explained in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958):

> . . . there are certain agreements or practices which . . . are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[10]

One category of restraints presumed to be unlawful *per se* are customer and territorial allocations among firms competing at the same level of a market. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972). The decision of the Court below, by focusing upon "purpose", ignores the reason that horizontal customer and territorial restraints are considered unlawful *per se*. By requiring an analysis of *purpose* to classify such a restraint as horizontal or vertical, the Court below would require precisely the sort of "elaborate inquiry" into purpose or effect that *per se* rules governing horizontal restraints are designed to avoid.

The purpose test of the Court below also undermines traditional *per se* rules of illegality in vertical relationships, particularly the bar against vertical resale price maintenance. The Court below held that a resale price maintenance conspiracy among dealers and their supplying manufacturer should be scrutinized under the Rule of Reason if the benefit of the conspiracy would primarily

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[10] This Court reaffirmed this description of *per se* analysis in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. at 50.

redound to the manufacturer. (App. A, *infra*, 3a). This holding is flatly contrary to this Court's repeated application of a *per se* rule against resale price maintenance. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

The "purpose" analysis of the Court below also challenges other traditional *per se* rules governing vertical relationships, including tying arrangements and manufacturer-inspired group boycotts. *E.g., Fortner Enterprises Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) (tying); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958) (tying); *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941) (group boycott). The opinion of the Court below suggests that if the purposes of such restraints are to benefit the manufacturer, they should be judged under the Rule of Reason.

In sum, the decision of the Court below conflicts with the rationale for *per se* rules of illegality that this Court set forth in *Northern Pacific Railway*, and by so doing has threatened several specific *per se* rules of illegality that this Court has applied to manifestly anticompetitive restraints of trade.

IV. THE DECISION OF THE COURT BELOW RAISES ISSUES OF VITAL CONCERN TO MANY INDUSTRIES THAT EMPLOY DUAL DISTRIBUTION SYSTEMS.

Rice has suffered considerable economic harm as a result of its termination by Michelin. However, a review of the decision by the Court below is not needed simply to redress the injuries suffered by Rice. A review is necessary to preserve healthy competition for all businesses that compete at the wholesale level in dual distribution systems.

Dual distribution systems are common to a significant number of industries, particularly consumer good industries characterized by many retailers. Products distributed through dual distribution networks include, but are not limited to, air-conditioning equipment, apparel, appliances, automobiles, beer, books, candy, drugs, food equipment, footwear, glass, groceries, household goods, lumber, paint, petroleum, plumbing, records, television sets, tires, and tobacco. House Select Comm. on Small Business, The Impact Upon Small Business of Dual Distribution and Related Vertical Integration, H.R. Rep. No. 1943, 88th Cong., 2d Sess. (1964). In the aggregate, wholesale distributors represented more than one trillion dollars of economic activity in 1980. Bureau of Census, U.S. Dept. of Commerce, Revised Monthly Wholesale Trade 1 (1981).

The anticompetitive potential of dual distribution systems, particularly as they affect small businesses, has attracted the concern of Congress. *See, e.g.*, H.R. Rep. No. 1943, *supra*. *See also* Jones, *Marketing Strategy and Government Regulation in Dual Distribution Practices*, 1965-1966 Geo. Wash. L. Rev. 456 (1966). Congress has paid particular attention to the anticompetitive potential of dual distribution in the automotive tire industry. *See, e.g.*, Subcomm. on Retailing, Distribution and Marketing Practices of the Senate Select Comm. on Small Business, 88th Cong., 2d Sess., Studies of Dual Distribution: The Automotive Tire Industry (Comm. Print 1964).

The confusing and conflicting nature of the lower court case law applicable to restraints upon competition within dual distribution systems has created a sense of uncertainty among businesses and their antitrust advisers. *See* Altschuler, *Sylvania, Vertical Restraints, and Dual Distribution*, 25 Antitrust Bull. 1, 102 (Apr. 1980); Panel Discussion, *Sherman Act Implications of Dual*

Distribution, 48 ANTITRUST L. J. 1795 (1979); Note, *Antitrust Treatment of Intrabrand Territorial Restraints Within a Dual Distribution System*, 56 TEX. L. REV. 1486 (1978); *Justice Department Aims at Dual Distribution*, Bus. Week, July 7, 1980, at 24.

There is no suggestion in this Court's opinions that traditional antitrust analysis should be cast aside when restraints occur in a dual distribution system. This Court should take clear and unmistakable action to redirect the disparate paths taken by the lower courts in dual distribution cases back to the appropriate course of antitrust analysis prescribed by this Court in *McKesson* and *Topco*.

CONCLUSION

To resolve conflicting interpretations of a basic issue of antitrust law that directly affects every industry engaged in dual distribution, the petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY J. WATERS
ROBERT H. MORSE
GLENN R. REICHARDT
JEFFREY N. MARTIN
PEABODY, RIVLIN, LAMBERT
& MEYERS
A Professional Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 457-1000

GEORGE W. SHAFFER
WILLIAM N. ROGERS
SHAFFER & ROGERS
17 West Jefferson Street
Rockville, Maryland 20850
(301) 279-2100
Counsel for Petitioner

July 24, 1981

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1155

DONALD B. RICE TIRE COMPANY,
(a corporation),
Appellant,

versus

MICHELIN TIRE CORPORATION,
Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Joseph H. Young, District Judge

Argued October 8, 1980 Decided January 12, 1981

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge and PHILLIPS, Circuit Judge.

Timothy J. Waters (Robert H. Morse, Glenn R. Reichardt, Peabody, Rivlin, Lambert & Meyers); George W. Shaffer, William N. Rogers, Shaffer & Rogers on brief) for Appellant; Robert P. Knapp, Jr. (Raymond L. Herbert, Bruce N. Morton, William W. Wilbourne, III, Lowe & Knapp; James J. Bierbower, Edwin S. Rockefeller, W. Richard Haddad, Bierbower and Rockefeller on brief) for Appellee.

PER CURIAM:

This is an appeal from a judgment of the United States District Court for the District of Maryland in

favor of defendant Michelin Tire Corporation (Michelin) in an action brought by plaintiff Donald B. Rice Tire Company (Rice) for treble damages for alleged violations of § 1 of the Sherman Act, 15 U.S.C. § 1, resulting from the termination of Rice's dealer relationship with Michelin. At trial, Rice sought to prove that Michelin chose not to renew its dealer sales agreement with Rice because Rice failed to comply with various restraints that it contended were unlawful. Michelin, on the other hand, sought to demonstrate that its decision to terminate Rice constituted unilateral action not within the scope of § 1, that it did not impose the restraints alleged by Rice, and that, if it did, the restraints were legal.

The district court found the "requisite degree of involvement of other parties" to infer a conspiracy under *United States v. Parke Davis & Co.*, 353 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), but concluded that any restraints imposed as a result of a conspiracy between Michelin and some of its dealers must be regarded as vertical ones inasmuch as they were imposed by a manufacturer on its dealers. *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 754 (D. Md. 1980) (relying on *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 856, 18 L.Ed.2d 1249 (1967)). Applying a "rule of reason" analysis with emphasis on a "free rider" rationale, the district court then concluded that any detrimental effect on intrabrand competition resulting from Michelin's imposition of certain vertical nonprice restraints was outweighed by the beneficial effect that those restraints had on interbrand competition. *Id.* at 756-60; *see Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). Therefore, the district court held that Michelin had not acted in violation of 15 U.S.C. § 1. *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. at 761-62.

We find the ultimate result reached by the district court to be the correct one. We must reject, however,

any implication arising from the district court's discussion of *Schwinn* that a restraint may always be regarded as vertical if it is imposed by the manufacturer. *See id.* at 754. Although the Supreme Court did emphasize in *Schwinn* that the source of the restrictions in that case was the manufacturer, it went on to distinguish the restrictions under consideration from "horizontal restraints, in which the actors are distributors with or without the manufacturer's participation." *United States v. Arnold, Schwinn & Co.*, 388 U.S. at 372, 87 S.Ct. at 1862. Thus we think it is important to distinguish between a conspiracy among dealers and their supplying manufacturer for the purpose of retail price maintenance that would benefit the dealers and one involving the same parties but redounding primarily to the benefit of the manufacturer as a result of increased interbrand competition. A restraint imposed by the former conspiracy would be horizontal in nature and *per se* illegal, while one imposed by the latter would be vertical and analyzed under the rule of reason.

The district court, however, refused to proceed with a functional analysis in the case below in the belief that such an analysis "would merely duplicate some of the necessary steps in the rule of reason analysis." *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. at 754. Since we agree that, on the facts of the instant case, the two inquiries so nearly coincide, we accept the district court's rule of reason discussion, which clearly indicates that the restraints were for the purpose of promoting interbrand competition, as an answer to both questions.

With the foregoing clarification, we affirm the judgment of the district court on the basis of that court's searching and well reasoned opinion. 483 F. Supp. 750 (D. Md. 1980).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1155

DONALD B. RICE TIRE COMPANY,
(a corporation),
Appellant,

vs.

MICHELIN TIRE CORPORATION,
Appellee.

Appeal from the United States District Court
for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate, II
Clerk

Filed Jan. 12, 1981

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1155

DONALD B. RICE TIRE COMPANY, ETC.,
Appellant,

versus

MICHELIN TIRE CORPORATION,
Appellee.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Haynsworth and Judge Bryan.

For the Court,

/s/ William K. Slate, II
Clerk

Filed Apr. 28, 1981

APPENDIX D

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. Y-78-209

DONALD B. RICE TIRE COMPANY, INC.

v.

MICHELIN TIRE CORPORATION

Jan. 30, 1980

George W. Shaffer, William N. Rogers, Rockville, Md., Timothy J. Waters, and Robert H. Morse, Washington, D. C., for plaintiff.

James J. Bierbower, Bethesda, Md., Robert P. Knapp, Jr., and Raymond L. Herbert, New York City, for defendant.

JOSEPH H. YOUNG, District Judge.

Plaintiff Donald B. Rice Tire Company (Rice) sued the Michelin Tire Corporation (Michelin) for treble damages for alleged violations of 15 U.S.C. § 1 resulting from the termination of Rice's dealer relationship with Michelin. At trial, plaintiff sought to prove that defendant chose not to sign a new annual dealer sales agreement because Rice failed to comply with various restraints which Rice contended were unlawful. The defendant sought to demonstrate that its decision to terminate Rice constituted unilateral action not within the scope of § 1, that it did not, in fact, impose the restraints alleged by the plaintiff, and that, in any case, the restraints were legal.

The evidence presented to the Court indicates that defendant's decision does not constitute unilateral action escaping scrutiny under § 1. In addition, the evidence shows that the nonrenewal decision was motivated, at least in part, by defendant's desire to impose various restraints upon its authorized dealers. Plaintiff failed to establish, however, that the overall effect of the contested restraints was anti-competitive and thus that they were unreasonable under *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). Because this Court's decision turns in large part upon its assessment of the competitive effects of the nonrenewal decision, a brief review of the events leading up to the decision is in order.

Factual Background

The Donald B. Rice Tire Company is an independent tire dealer located in Frederick, Maryland, approximately forty miles from both Washington and Baltimore. The company was founded in 1955. During the late 1960's, Rice began to sell Michelin tires which it bought from an authorized dealer. In 1970, following discussions between Rice and Michelin, a dealer sales agreement (DSA) was signed. The DSA was for a period of a year and subsequent contracts were signed by the parties annually until 1977 when Rice was notified of the nonrenewal decision. During this seven-year period, plaintiff experienced very rapid growth. In 1970, Rice had sales of approximately $500,000, whereas by 1977, sales exceeded $10,000,000. A substantial part of this increase resulted from Rice's decision in 1973 to become a large-scale wholesaler of Michelin tires. The wholesale portion of plaintiff's business, which accounted for less than 25% of total sales in 1972, expanded to the point that in 1977 it represented 80% of Rice's business. Plaintiff was particularly successful in its efforts to wholesale Michelin tires; by 1977, its volume of Michelin sales exceeded

$4,000,000, making it one of the largest Michelin dealers in the country.

Rice took full advantage of discounts offered by Michelin on a per order and annual basis for large volume sales. Employment of this strategy enabled Rice to purchase Michelin tires 15% more cheaply than buyers who were not entitled to any discounts. Rice then wholesaled to smaller authorized dealers and to unauthorized Michelin dealers. Rice's rapid growth was accompanied by a corresponding expansion in the geographical area in which it competed. Whereas in 1972, Rice competed almost exclusively in the geographical area within 150 miles of Frederick, by 1977, approximately 20% of plaintiff's sales were outside the area consisting of Maryland and the states contiguous to it.

Throughout these proceedings, the defendant was much more reticent than the plaintiff in voluntarily revealing information pertaining to corporate organization, strategy, and sales volume. Nevertheless, testimony at trial established Michelin's successful penetration of the American tire market. Although Michelin had developed the steel-belted radial tire during the 1940's and had widely distributed it in Europe during the 1950's, the radial tire, the only type manufactured by Michelin, was not actively promoted in the United States until the latter half of the 1960's. The first significant step in this direction occurred in 1964 when Sears, Roebuck and Company began selling Michelin tires under its private Allstate label.

The next stage in Michelin's drive to penetrate the American market, according to the testimony of dealers and former Michelin employees, consisted of signing large, established dealers who assumed responsibility for introducing and distributing Michelin tires in their geographical areas. These large dealers retailed Michelin tires and also wholesaled them to "associate dealers."

This method of distribution was in part a result of a shortage of trained Michelin sales personnel.

Michelin followed this distribution method until the mid-1970's when it increased the number of authorized Michelin dealers and assumed a greater portion of the wholesaling function. Thus, the number of authorized dealers increased from 300 in 1969 to 2500 in 1977. The change in policy was also reflected in the DSA employed by Michelin. The DSA signed by the parties in 1973 provided that "Dealer may appoint one or more Associate Dealers . . . of good financial standing, business reputation and service capabilities . . . [and] shall notify Seller of every Associate Dealer appointment on a form specified and furnished by Seller." By 1975, this provision had been replaced by the following language: "It is understood that the right to appoint dealers in Michelin brand products is reserved to Seller and the privilege to deal in Michelin brand products is non-exclusive."

As plaintiff's success in wholesaling Michelin tires from 1973 through 1977 indicates, the defendant's attempts to integrate vertically were not entirely successful. Unauthorized dealers, as well as smaller Michelin dealers who could not qualify for the maximum quantity discounts, continued to buy from Rice and other dealers who wholesaled. In addition, even large dealers would buy Michelin tires from Rice when they were unavailable from Michelin. Finally, in late 1977 and early 1978, Michelin decided not to renew Rice and other authorized dealers who extensively and aggressively wholesaled Michelin tires. Although those nonrenewal decisions are not at issue in this case, the fact remains that they cast light upon the defendant's rationale in the instant dispute. The conclusion that the nonrenewal decision in this case was motivated in large part by Michelin's desire to assume primary responsibility for the wholesaling func-

tion is further bolstered by the deposition testimony of Gerard W. Boyle, the President of Englewood Tire Distributors, who stated that the defendant's decision not to renew his dealership agreement was revoked when he offered to terminate his wholesaling activities.

At trial, plaintiff presented evidence of two other forms of restraint imposed by Michelin upon its authorized dealers. First, the DSA contains a location clause limiting the effect of the agreement to the locations specified. This provision was enforced by Michelin's policy of shipping goods to designated locations. In addition, the evidence establishes, and defendant did not contest, that although dealers could pick up tires from the warehouse located in their geographical area, and thereby earn a rebate, they were not permitted to pick up tires from warehouses located elsewhere, even though Michelin would ship tires from nonlocal warehouses in the event of shortages. Plaintiff contended that these policies operated to impede its efforts to compete on a national scale. The economic rationales underlying these restraints as well as the evidence presented concerning the actual competitive consequences of the nonrenewal decision will be examined herein. This analysis is mandated by the Supreme Court's decision in *Sylvania*, which recognized that vertical restrictions might simultaneously suppress intrabrand competition while promoting interbrand competition. *See generally*, ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition (1977).

The Rice Nonrenewal Decision-Unilateral Action or Contract, Combination or Conspiracy in Restraint of Trade

It is necessary to assess defendant's argument that the nonrenewal decision was a unilateral action not subject to scrutiny under 15 U.S.C. § 1 which proscribes "[e]very contract, combination . . . or conspiracy . . . in

restraint of trade . . .," before proceeding to an evaluation of the reasonableness of the restraints imposed by Michelin on its dealers. While a seller "may announce in advance the circumstances under which he will refuse to sell," *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919), it is not necessary for this Court to find an express or implied contract to conclude that defendant's conduct cannot be characterized as purely unilateral. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960). Testimony at trial reveals the requisite degree of involvement of other parties.

Jean Pierre Duleyrie, the Vice-President in charge of sales, and the individual primarily responsible for the nonrenewal decision conceded that complaints from Michelin sales personnel in other areas and from other tire dealers about plaintiff's geographically extensive and large-scale wholesaling activities contributed to the decision. While Michelin sales personnel do not qualify as economically distinct entities with whom defendant could conspire or contract, *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir. 1979), other Michelin tire dealers do qualify. Numerous other witnesses testified that other tire dealers complained to Michelin personnel about plaintiff's activities. In light of this testimony, as well as Duleyrie's concession that no other types of complaints from any sources about any other aspects of plaintiff's business were received prior to the nonrenewal decision, it is apparent that a combination existed for the purposes of § 1 between Michelin and some of its authorized dealers.

Is The Restraint Horizonal or Vertical

Application of the rule of reason standard presupposes that the restraints are vertical. Plaintiff's argument that the restraints should be characterized as horizontal would

require a finding that the restraints are illegal because horizontal restraints are illegal *per se*. *United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); and *United States v. Topco Associates*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). In support of its contention, plaintiff points to the fact that the parties compete at the wholesale level.

The Supreme Court's decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967) (overruled on other grounds by *Sylvania, supra*), suggests that in a dual distribution system where the manufacturer is both supplier and competitor, the restraints imposed are to be evaluated as vertical because "[t]he source of the restrictions is the manufacturer." Some lower courts, however, have rejected this approach in favor of a functional analysis directed at the impetus, purpose, and effect of the restrictions. *See, e.g., Dougherty v. Continental Oil Co.*, 579 F.2d 954 (5th Cir. 1978); *Rubbermaid, Inc. v. F.T.C.*, 575 F.2d 1169 (6th Cir. 1978); *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978). This Court rejects the latter approach for a number of reasons. First, the Supreme Court's decision in *Sylvania* clearly indicates that "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." 433 U.S. at 50, 97 S.Ct. at 2557. Given that the Court in *Sylvania* acknowledged that restraints imposed by manufacturers on sellers may benefit interbrand competition, application of a *per se* rule which does not take those benefits into account, merely because the parties are also competitors, appears to be inappropriate. A more extended functional analysis to determine whether the restraint should be characterized as horizontal or vertical, on the other hand, would merely duplicate some of the necessary steps in the rule of reason analysis because the vertical restraints least likely to promote interbrand competition are those

which are the functional equivalent of horizontal dealer cartels in which the impetus for the restraint is the dealers' interest in higher prices rather than the manufacturer's interest in a more efficient distribution system. Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum.L.Rev. 282, 298 (1975); *Fuchs Sugars, supra*, 602 F.2d at 1030; *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978). Therefore, a more sensible approach incorporates the horizontal/vertical inquiry into the application of the rule of reason.

Defining the Relevant Market

The relevant market must be defined in order to evaluate the competitive consequences of the restraints at issue in this case. *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1979). Although the parties have suggested numerous variables bearing on market definition, the task is quite burdensome in the context of this case.

The inquiry will be simplified by articulating at the outset the types of variables that are relevant to market definition. First, it should be noted that the relevant geographic and product markets are defined primarily with reference to cross-elasticity of demand. *Neugebauer v. A. S. Abell Co.*, 474 F.Supp. 1053 (D.Md.1979) (citing *United States v. E. I. duPont de Nemours*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956)). Defendant's expert witness, Dr. Peter D. Linneman also pointed out that cross-elasticity of supply plays a role in defining the product market. Areeda and Turner, Antitrust Law, Vol. II, 374-376 (1978); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-26, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). In this connection, he suggested that factors such as common inputs and the ease with which a manufacturer could shift the geographical or product focus of his activities were relevant to market definition.

There is a wide range of possible parameters relating to definition of the product market: brand; use (truck, earth mover, and passenger car tires); construction (radial vs. non-radial); application (original equipment vs. replacement); and newness (new vs. retread). The parties agreed that the product market should be divided according to use and plaintiff contended that Michelin tires should be considered a separate market. Although the evidence clearly established that Michelin is a premium tire with a reputation for durability and safety, these attributes are insufficient under the functional interchangeability test that serves as a proxy for cross-elasticity of demand, to justify such a narrow product market definition. *Neugebauer, supra.*

Defendant's contention that the original equipment and replacement markets should be grouped together is more problematic. As Dr. Linneman suggested, producers can easily shift their activities in these two areas in response to price changes. Customers, however, do not buy vehicles to obtain tires. Therefore, at first glance, there is high cross-elasticity of supply but not of demand. This conclusion rests on the assumption that motor vehicle manufacturers and dealers and vehicle owners are not buyers in the same market. Upon reflection, however, it is necessary to reject this premise in light of the fact that all of these buyers are competing for access to the same products. An increase in demand for tires by automobile manufacturers for example would result in higher prices being charged to both manufacturers and vehicle owners.

More difficult problems of definition are presented by the remaining variables. Initially, it would seem that radial and non-radial tires should be included in the same product market. Much less superficially similar products have been so grouped. In *duPont, supra,* for example, the Supreme Court rejected the contention that

the correct product market was cellophane and held that all flexible wrapping materials should be included. 351 U.S. at 400, 76 S.Ct. at 994. In the replacement tire market, however, radials and non-radials, despite their superficial similarity, are not feasible substitutes unless the customer is replacing all of the tires on his vehicle because consumers are advised that safety reasons militate against mixing radials and non-radials. The conclusion that radials and non-radials are not in the same product market is bolstered by evidence of very significant price differentials between the two types of tires. A 1977 Modern Tire Dealer survey indicated that the median price for bias tires was between $30 and $35 and that bias belted tires averaged $5 more. The median price for radial tires, on the other hand was between $60 and $65. This conclusion is also bolstered by the testimony of the plaintiff's expert witness, Dr. Robert George Cox. Dr. Cox stated that it is difficult to transform plants for the manufacturing of bias and bias-belted tires into facilities for the production of radial tires.

The evidence relevant to new and retread tires also indicates a substantial price differential. Moreover, the production facilities for the two products are totally distinct. Testimony established, however, that there was high cross-elasticity of demand between these two types of products, particularly in the truck tire market. Manufacturers compete on the basis of how many times their radial tires can be retreaded. Numerous tire dealers testified that truck fleet owners were extremely sophisticated buyers who compared tires on the basis of cost per mile. Given this fact, as well as the fact that new and retreaded tires are functionally interchangeable, it follows that new and retread truck tires are in the same product market. Although automobile owners are presumably less expert tire buyers, there is no reason to think that the availability of retreads as a substitute for new tires does not also affect prices charged for new radial tires.

The evidence relevant to definition of the appropriate geographical market suggests that the Baltimore-Washington metropolitan area is the proper benchmark. Areeda and Turner, *supra*, Vol. II at 358, state the general proposition that "[t]wo areas are ordinarily separate markets where there are no or only episodic sales between them and where transport costs exceed any price differentials between the two areas." In this case, the tire dealers who testified, including plaintiff, indicated that the great bulk of their business was in the immediate metropolitan area and that transportation costs generally prevented sales in other areas even where a price differential might exist. The barrier presented by transportation costs is underlined by plaintiff's desire to "drop-ship" tires to distant customers rather than to ship them from plaintiff's establishment in Maryland. The other factors outlined by Areeda and Turner, *supra*, Vo. II at 367, that bear on the definition of the geographical market also support this conclusion. First, "[f]or some products . . . the availability of immediate servicing is of critical importance, and consumers will not buy the product unless immediate servicing is readily available. For other products, the immediate availability of the product itself is important and local distribution facilities are essential to successful marketing. And where consumer goods . . . are concerned, heavy initial promotional expenditures may be necessary successfully to penetrate a particular geographic area . . . ." Thus, the necessity of providing point-of-sale services precludes rapid shifts in supply in response to price changes. This appears to be true in the tire industry. As noted further herein, promotion and service are essential to the efficient marketing of tires.

The Reasonableness of the Restraint

The Court in *Sylvania* recognized a number of types of marketing efficiencies that might result from the man-

ufacturer's imposition of vertical restraints. It pointed out that entrants into a market might use such restrictions "to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." In addition, "[e]stablished manufacturers can use [such restraints] to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." 433 U.S. at 55, 97 S.Ct. at 2560. Also, the Court noted that developments in products liability law result in greater "demands that manufacturers assume direct responsibility for the safety and quality of their products." *Id.* at n.23. At trial, defendant introduced evidence in support of its contention that the restraints at issue in this case can be justified on all of the grounds enumerated above, thus contesting the plaintiff's evidence that the reasons given were pretextual. As the following review of the evidence will demonstrate, although the first and third contentions are without factual basis, the second contention is supported by the evidence.

The New Entrant Rationale

The evidence introduced by defendant on this point established that it is a relatively new entrant into a highly concentrated market with a relatively small market share. Other evidence established, however, that the restraints on intraband competition were not necessary to induce retailers to carry and promote the Michelin product. First, the evidence suggested that Michelin, as a result of its introduction of the radial tire, and its apparently well-deserved reputation for quality workmanship, had no difficulties finding dealers for its products. On the contrary, several dealers testified as to their difficulties in obtaining a DSA. Testimony of dealers and Michelin sales personnel established that there were frequently shortages of Michelin tires. These facts militate

against the need for offering incentives to dealers to obtain aggressive sales personnel at the retail level. In any case, the Court is skeptical of the validity of this rationale for permitting vertical restraints. As one commentator has suggested, vertical restraints imposed by the manufacturer to attract distributors may be indistinguishable from restraints imposed to implement a dealer cartel. *See* Pitofsky, The *Sylvania* Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Colum.L.Rev. 1, 19 (1978). Because dealer cartels are horizontal restraints, subject to *per se* prohibition, their functional equivalents should be strictly evaluated.

The Free-Rider Rationale

The main thrust of defendant's case was to bring it within the second justification for vertical restraints suggested above. Its evidence established that plaintiff did not bear its fair share of the costs of promoting and servicing Michelin tires. The customer restrictions imposed by Michelin in deciding not to renew those dealers who wholesaled extensively, thereby threatening remaining dealers who might contemplate such a sales strategy, were shown to be necessary to prevent free-riding by retailers on the services provided by other dealers. Failure to impose such sanctions would induce dealers to decrease the amount of services offered in order not to be undersold by free-riding dealers. Eventually, "these services might not be provided by retailers . . . despite the fact that each retailer's benefit would be greater if all provided the services than if none did." 433 U.S. at 55, 97 S.Ct. at 2560.

Free-Riding on the Promotional Efforts of Michelin and Other Dealers

Plaintiff was one of the largest Michelin dealers in the country. Its promotional efforts, however, consisted of advertising in the local newspaper and on radio, and in

supplying some promotional materials and information to the dealers to whom it sold. Given this fact, as well as Kenneth Rice's testimony that he wholesaled tires because of the low level of cost involved, it appears that the level of advertising expenditures was not consummate with the sales volume. The evidence suggested a number of ways in which plaintiff was free-riding on the promotional efforts of others.

One of the reasons given by the defendant for the nonrenewal decision was plaintiff's failure to have a Michelin sign outside his business premises. In light of the fact that other dealers did not have signs, that a previous sign had to be removed at the insistence of the local zoning authorities, and that plaintiff had offered to erect a sign on adjacent property, this reason does not appear significant. This conclusion is bolstered by the testimony of Michelin's sales personnel that the lack of a sign was not in itself a sufficiently serious matter justifying nonrenewal.

Of greater concern are the plaintiff's sales to unauthorized Michelin dealers. These dealers, unlike those operating under a DSA were not contractually obligated to "vigorously and aggressively promote the retail sale of Michelin Products." Rather, they were free to reap the benefits of increased demand for Michelin tires generated by the promotional efforts of authorized dealers. Michelin could have reasonably concluded that its authorized dealers, as evidenced by the fact that Michelin's adamount of promotion lest they be undersold by unauthorized dealers, as evidenced by the fact that Michelin's advantage in the radial market stemming from its pioneering role and reputation for quality was apparently declining as other major tire manufacturers developed radial tires of comparable quality and price that were rapidly gaining acceptance. The need for Michelin to respond to this increased competition from other radial

tire manufacturers by expanded promotional efforts is underscored by the testimony of Thomas Pumpelly, president of National Tire Wholesalers to the effect that Michelin has recently changed its discount policy so that quantity discounts are conditioned on dealers spending 3% on advertising.

The fact that Michelin has changed its discount policy to directly require a certain level of expenditures from retailers desiring quantity discounts raises questions concerning the possible overbreadth of the means used to remedy plaintiff's free-riding. Application of the rule of reason does require an inquiry into whether the restraint is "reasonably necessary." *Newbury v. Washington Post Co.*, 438 F.Supp. 470 (D.D.C. 1977); *Eiberger v. Sony Corp.*, 459 F.Supp. 1276, 1282 (S.D.N.Y. 1978). Pitofsky, *supra*, suggests that such scrutiny is useful to illuminate the true purpose of a restriction. A poor fit between means and ends suggests that the avowed purpose is merely a pretext. Given the fact that plaintiff did not restrict his wholesaling efforts to the immediate geographical market, it cannot be said that the means used were not reasonably necessary. Requiring the plaintiff to spend the specified amount for advertising to qualify for the quantity discount might be ineffective if the promotional efforts and the retail sales were not in the same geographical market, or even if the promotional efforts were merely undertaken by a dealer other than the ultimate retailer of the tire.

Free-Riding on the Services Provided by Other Authorized Dealers

Defendant introduced evidence concerning the important role of service in marketing Michelin tires. Duleyrie testified that service was especially important in the truck tire market. Proper selection of tires for truck fleets depends on the size of the tire, choice of ply rating,

variance in the loads to be carried, and the speeds at which, and road surfaces upon which, the truck would be driven. He also stated that repairing and retreading services were important. Dr. Ira Robert Ehrlich, the defendant's expert witness in the field of tire engineering also asserted that service of Michelin tires required specialized knowledge. Tire selection, according to Dr. Ehrlich, also depends on the types of tube and rim involved. In addition, different brands of tires have different inflation specifications. Alexander Jankowsky, the national truck tire sales manager for Michelin, testified that Michelin recommended different methods of repairing and retreading from those endorsed by other manufacturers. Michelin also differed in its recommendations concerning balancing methods and use of sealants. From this evidence, the Court concludes that Michelin had a legitimate interest in ensuring that tires were sold by dealers who could provide these specialized services. This conclusion is buttressed by the provision in the DSA requiring that the dealer "render prompt, workmanlike and courteous service with respect to Michelin Products including all services to which a purchaser of a Michelin Product from any authorized Michelin source may be entitled." Several dealers testified that they had difficulty obtaining DSA's as a result of their lack of service facilities.

At trial, defendant attempted to show that plaintiff's own service facilities were inadequate. This attempt failed in light of the unanimity of opinion among witnesses for both parties that plaintiff's service facilities were adequate, and that no complaints have ever been received concerning services rendered. The evidence with respect to plaintiff's facilities did establish that the volume of services performed was not commensurate with the volume of Michelin tires sold by plaintiff. This fact was conceded to be a function of plaintiff's wholesaling activities.

Several cases have recognized the manufacturer's legitimate interest in ensuring the provision of point-of-sale services. *See, e.g., Golden Gate Acceptance Corp. v. General Motors*, 597 F.2d 676 (9th Cir. 1979); and *Eiberger, supra.* The economic argument, as outlined in Posner, *supra*, at 283-85, is that if manufacturers are not permitted to impose vertical restraints which have the effect of stimulating point-of-sale services, dealers will not provide these services lest they be undercut by dealers not providing services. The problem is particularly acute in markets wherein it is difficult to prevent customers from obtaining services at one location while purchasing products from another outlet that does not offer the services but does offer lower prices.

The evidence at trial established that plaintiff's sales to unauthorized dealers were creating such problems. Duleyrie testified of an instance in which a truck fleet owner (user) had purchased Michelin tires from an unauthorized dealer. This user had not received the proper assistance in selection and application of the tires. Although the tires were not defective, Michelin had to make commercial concessions to avoid losing the account. Although Duleyrie conceded that the tires in question were not traced to Rice, it is reasonable to conclude that Rice's wholesaling activities created the risk that this type of problem would occur.

As the DSA indicates, Michelin dealers are obligated to service Michelin tires. Customers who bought Michelin tires from unauthorized dealers who were not so obligated presumably went to authorized dealers to obtain service. Brent Rigby, who formerly served as district manager for the Baltimore district, testified that dealers resent having to service tires that they did not sell. This fact was conceded by a number of tire dealers and suggests that the free-rider problems set out earlier existed and that Michelin reasonably could have determined that

nonrenewal of major wholesalers was necessary to ensure provision of point-of-sale services.

Robert M. Johnson, Vice President of Rice, testified that the company took care of adjustments for defective tires sold to other dealers and indicated that Michelin's sales representative had classified Rice's number of adjustments as average. However, this does not prove that customers were, or were not, receiving adequate assistance in selection, application, maintenance and repair for tires purchased from unauthorized dealers who had purchased from Rice. Plaintiff's reliance upon Michelin's policy of tolerating wholesaling to small dealers is also misplaced. This policy probably resulted from a realization that such wholesaling was a universal practice. Michelin, with good reason, could have concluded that the costs of enforcing a ban on such wholesaling exceeded any gain to be derived from enforcement. Although some courts have strictly scrutinized the means employed by a manufacturer to achieve an admittedly legitimate objective, *see, e.g., Eiberger, supra*, the Court should not second-guess a manufacturer's choice from a range of alternative strategies.

The other evidence introduced by plaintiff to show that the service rationale was a pretext was the testimony of one dealer that the local Michelin sales representative suggested that he establish a sham retail operation in order to maintain his wholesale business in Michelin tires. This evidence, however, does not undermine the Court's conclusion that Michelin management was concerned about the services received by purchasers of its products. Sales personnel employed by Michelin earned commissions on tires sold to dealers in their areas. This arrangement clearly resulted in such personnel adopting a protective attitude towards the authorized dealers in their areas and was also responsible for the fact that sales personnel had a disincentive to report any inadequacies in the services offered by dealers in their area.

This fact supports the necessity of Michelin management taking steps to ensure provision of point-of-sale services.

Territorial Restrictions

At trial, plaintiff introduced evidence that Michelin imposed territorial as well as customer restrictions on its authorized dealers. These territorial restrictions took the form of location clauses in the DSA and in the institution of a warehouse policy. Testimony established that the location clause was designed to ensure that authorized dealers only sold Michelin tires at locations at which they could provide services. The warehouse policy in effect barred dealers from picking up tires at warehouses not located in their district. They were permitted to pick up tires at the local warehouse and thereby earn a discount. In addition, if tires were unavailable at the local warehouse, Michelin would ship the tires to the dealer. Dr. Linneman suggested a persuasive economic rationale for this practice. Michelin presumably warehoused tires at the various regional warehouses in accordance with its forecasts concerning anticipated demand for Michelin tires in the area. Permitting dealers to pick up tires from any warehouse would make such planning more expensive. Dr. Linneman did concede, however, that the rationale underlying this policy did not apply when the customer was located in the district served by the warehouse, as its needs were presumably taken into account in supplying inventory for that warehouse. In evaluating the legality of this particular restraint, the Court is aware that "the fact that no competitive benefits are advanced in favor of a restraint . . . does not automatically constitute it unreasonable. . . ." *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1979). The plaintiff has the burden of establishing that the restraint actually harmed competition. The actual competitive consequences of the restraints at issue will be

evaluated herein. First, however, the safety rationale must be considered.

The Safety Rationale

Duleyrie testified that one of the reasons behind plaintiff's nonrenewal was the fact that only 4% of the registration cards required by the Department of Transportation had been filed with Michelin for tires sold by Michelin to Rice. The validity of this rationale is undercut, however, by the fact that defendant had received no complaints concerning Rice's handling of the DOT cards. More importantly, numerous witnesses including Edward H. Wallace, the former Chief of the Tire Division at DOT, testified that he wrote the specifications for the registration program and that the wholesaler's duty was to supply the cards to the retailer and that it was the retailer's responsibility to submit them to the manufacturer when the tire was sold to the ultimate consumer. Kenneth Rice testified that he complied with his obligation as a wholesaler. The defendant offered no evidence to rebut this testimony. Therefore, the Court concludes that despite the fact that there is precedent for upholding vertical restrictions designed to promote safety, *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3rd Cir. 1970), this case does not fall within that rationale.

Effects of the Restraints on Intrabrand and Interbrand Competition

The benefits to interbrand competition expected to result from the vertical restraints imposed by Michelin upon its dealers have been discussed. However, the rule of reason standard requires an assessment of the potential detriment to intrabrand competition of the challenged restraints.

Several authors have suggested a structural approach to this problem. See Louis, Vertical Distribution Re-

straints After *Sylvania:* A Postscript and Comment, 76 Mich.L.Rev. 265 (1977) and Pitofsky, *supra.* Generally, the greater the interbrand competition, the less effective vertical restraints will be in limiting intrabrand competition because dealers in a very competitive industry are constrained by competition from sellers of other brands. *Cf. H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978). In addition, the greater the degree of product differentiation, the greater the potential for restriction of intrabrand competition. *See e.g., Westman Commission Co. v. Hobart Corp*, 461 F.Supp. 627 (D.Colo. 1978). Finally, under most circumstances, the manufacturer will have an interest in maintaining intrabrand competition because dealer competition in price and services should increase demand for the manufacturer's product.

As stated above, this Court has reached the conclusion that the appropriate product markets are the radial car tire market, the radial truck tire market, and the radial off-the-road vehicle tire market. In each case, the original equipment and retread segments of the market are included. Although the Court concluded that the relevant geographic market is the Baltimore-Washington metropolitan area, it must rely upon figures pertaining to national market share as they are the only available figures. Dr. Linneman testified that Michelin's share of the radial passenger tire market was 7.9% in 1977, the year of plaintiff's nonrenewal. Michelin's share of the radial truck tire market was more difficult for the experts to calculate as less detailed information was available. Dr. Cox testified, however, that he estimated Michelin's share of that market was approximately 20 to 25%. No figures were available for off-the-road tires, but that market was not the primary focus of the case. Needless to say, the parties' experts disagree as to whether Michelin's market share was large enough to give it market power. An examination of the other

variables bearing on this question indicates that it was not.

Market power is defined as the ability of a producer to raise and sustain prices above the competitive market. Only a firm with market power can effectively restrain competition. While Michelin may have had such power in the late 1960's when it was the sole supplier of radial tires, the presence of larger producers of radial tires of comparable quality and price negates the inference that this was the case in 1977. The conclusion that Michelin lacked the requisite market power to restrain competition is supported by the testimony of numerous witnesses that competition in the industry was fierce, and by the lack of anything other than impressionistic evidence to support plaintiff's contention that Michelin was able to charge consistently higher prices for its products. Rather, Dr. Linneman's study of advertised passenger car tire prices in the Baltimore-Washington area established that during the latter half of the 1970's Michelin advertised prices declined in relation to those of other manufacturers, and were in fact lower than those of at least one of its competitors. In addition, the study showed advertised Michelin prices falling in real dollar terms during the period following plaintiff's nonrenewal. In fact, these downward trends accelerated after plaintiff's nonrenewal.

Although a similar study in the truck tire area would have been useful, as that was the market in which Michelin had a greater market share, the fact remains that plaintiff did not introduce any evidence to establish that this price study did not accurately reflect the realities of the market. Plaintiff failed to meet its burden of establishing that the defendant's actions had anticompetitive consequences.

The plaintiff's explanation of the rationale underlying defendant's conduct is open to question on other grounds.

Plaintiff suggested that defendant was motivated by a desire to eliminate plaintiff as a competitor at the wholesale stage of distribution but did not offer any convincing explanation of why defendant would not prefer to utilize plaintiff's services if plaintiff was in fact a more efficient wholesaler. Presumably, lower wholesale costs would lead to great demand for Michelin products and higher profits. Plaintiff's explanation is also not credible in light of the significant steps taken by defendant to increase intrabrand competition. The evidence established that Michelin deliberately expanded the number of retail outlets authorized to carry its products. Although it may be possible for a manufacturer to restrict intrabrand competition to protect existing dealers, *see, e.g., Westman Commission, supra,* this motivation was not at work in this case. Not only did Michelin increase the number of outlets, numerous dealers testified that Michelin had taken deliberate action to dismantle the system of exclusive geographic territories it had established during the 1960's. Thus, the vertical restraints imposed by Michelin were reasonably necessary to meet the fierce competition from other producers of radial tires and the plaintiff failed to show that Michelin's change in distribution strategies had adverse impacts on intrabrand competition.

The findings of fact and conclusions of law stated herein are in accordance with the provisions of Rule 52, F.R.Civ.P. whether or not specifically stated.

Accordingly, for the reasons stated herein, it is this 30th day of January, 1980, by the United States District Court for the District of Maryland, ORDERED: that Judgment BE, and the same is, hereby entered in favor of the defendant.

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NO. 81-154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD B. RICE TIRE COMPANY, INC.,

Petitioner,

v.

MICHELIN TIRE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

ROBERT P. KNAPP, JR.
RAYMOND L. HERBERT
135 West 50th Street
New York, New York 10020
(212) 974-1000

Counsel for Respondent

Of Counsel:

KEVIN S. FOGARTY
STEPHEN D. RYAN III
LOWE & KNAPP
135 West 50th Street
New York, New York 10020
(212) 974-1000

Questions Presented

1. Did the respondent tire manufacturer have the right under Section 1 of the Sherman Act to require its contractually authorized dealers to service the tires they had purchased from respondent and resold?

2. Should this Court disturb the findings of the District Court that the petitioner tire dealer was a "free-rider" who had prospered by failing to service and promote the sales of respondent's tires in accordance with respondent's reasonable requirements for all of its dealers?

3. Did the evidence establish that the nonrenewal of the "free-riding" petitioner as a dealer was anticompetitive?

4. Do the petitioner's cited authorities demonstrate a conflict between any other Court of Appeal's decision and the Court of Appeal's decision herein upholding the petitioner's nonrenewal because it was a "free-rider"? Do they otherwise require this Court to exercise its power of supervision?

5. Is there evidence to support the District Court's finding that respondent's decision not to renew petitioner's dealership was a consequence of a combination between the respondent and some of its other dealers?

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* On or about March 20, 1980, the respondent filed in the United States Court of Appeals for the Fourth Circuit a disclosure of corporate affiliation and financial interest, stating that it is an indirect subsidiary of a French commanditory partnership. The latter has certain corporate powers and attributes, but is not, as far as respondent's attorneys are aware, a corporation within any common law or statutory concept recognized in the United States.

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III. The authorities relied upon by the petitioner fail to show that the Court of Appeals' decision is "in conflict with the decision of another Federal Court of Appeals," nor does the petitioner claim or show that the decision of the Court of Appeals in any other respect calls "for an exercise of this Court's power of supervision" 14

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NO. 81-154

Supreme Court of the United States

IN THE

OCTOBER TERM, 1981

DONALD B. RICE TIRE COMPANY, INC.,

Petitioner,

v.

MICHELIN TIRE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

Statement of the Case

In November 1977, the respondent Michelin declined to renew the petitioner Rice's one-year "Dealer Sales Agreement" ("DSA") because, as the District Court found, and the Court of Appeals affirmed, Rice was a "free-rider," who had chosen to violate Michelin's reasonable contractual requirements that its dealers promote and

service its tires. Rice had perceived that it could greatly increase its sales and profits on Michelin tires by refusing to provide the full promotion and servicing that Michelin required of its dealers, while simply taking the utmost advantage of the demand created by the efforts of Michelin and its other dealers through full promotion and servicing of tires.

In January 1978, Rice sued Michelin under the Maryland antitrust act in the Circuit Court of Frederick County, Maryland. The respondent removed the case to the United States District Court. A year later, in January 1979, Rice served an amended complaint, in which it alleged a violation of Section 1 of the Sherman Antitrust Act and omitted any references to the Maryland act. The case was tried to the Court without a jury in November 1979, and the District Court, Joseph H. Young, U.S. D.J., entered judgment for Michelin. (6a*). Appeal, affirmance and denial of rehearing followed as set forth in the petition.

In rendering judgment the District Judge found as a fact that Michelin had determined not to offer Rice a 1978 dealership because, as the evidence established, Rice had been a free-rider, who "did not bear its fair share of the costs of promoting and servicing Michelin tires." (18a). He also found that Rice's nonrenewal had been "necessary to prevent free-riding by retailers on the services provided by other dealers" (*id.*) and went on to find further that "Michelin reasonably could have determined that nonrenewal of major wholesalers [of which Rice was one] was necessary to ensure provision of point-of-sale services." (23a). The District Judge also found that "The evidence suggested a number of ways in which

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* References so indicated are to the petition for certiorari.

[Rice] was free-riding on the promotional efforts of others." (19a).

These findings are predicated on further detailed and painstaking findings and analyses from technical and tire performance standpoints regarding the necessity for the dealer's servicing of Michelin tires (18a-22a), the reasonableness of Michelin's requirements that its dealers promote and service its tires (*id.*) and Rice's flagrant and admittedly profit-motivated determination to disregarded deliberately its obligations to promote sales and provide services that it had contractually assumed by its Michelin DSA. (19a, 21a).

As a distinctly separate and discrete basis for rejecting all of Rice's claims and granting judgment for Michelin, entirely unrelated to and disconnected from Rice's "free-riding," the courts below held that Rice had "failed to meet its burden of establishing that [Michelin's] actions had anticompetitive consequences." (27a, 3a). The lower courts found that "during the later half of the 1970's," which was a period of intensive and ever increasing inflation, the prices in Rice's market area for Michelin passenger car tires not only "declined in relation to those of other manufacturers," but actually fell "in real dollar terms during the period following plaintiffs' nonrenewal." (*Id.*). In addition the courts below found that Michelin had "deliberately expanded the number of retail outlets authorized to carry its products" (28a), increasing them "from 300 in 1969 to 2,500 in 1977" (9a) while expressly providing that its dealerships were not exclusive. (*Id.*). The District Court correctly concluded that Rice had "failed to show that Michelin's change in distribution strategies had adverse impact on intrabrand competition." (28a).

Rice's petition is perforce silent on every one of these clear and decisive adverse findings. In petitioning for certiorari, Rice implicitly asks this Court to ignore and disregard these findings below because the absence of any evidence to support its case compels it to ignore and disregard them. As a surrogate for the non-existent evidence that might support its contentions, Rice attempts to substitute legal theories that may be perfectly sound in the context in which they were enunciated, but which have no application to the nonrenewal of Rice's free-riding dealership and the subsequent lack of any injury to competition. Consequently, the granting of certiorari would be inappropriate.

Although Rice seems to have explored every difference and distinction in vertical and horizontal combinations, what in effect it urges this Court to do is to hold that a free-rider may with utter impunity flatly refuse to perform a manufacturer's reasonable, procompetitive, pro-consumer contractual requirements for promoting and servicing its product so that the free-rider may reap where only other dealers competing with him have sown their own promotional and servicing expenditures. For, says Rice, if any such competing dealer should complain that he has incurred promotional and servicing expenses where the free-rider has none, the manufacturer's non-renewal of the free-rider would constitute an unlawful combination in restraint of trade. In other words, Rice argues that unless the manufacturer offers the free-rider a further dealership contract that the free-rider has no intention of performing, the free-rider should be awarded treble damages for his nonrenewal, presumably including three times the aggregate prospective increase in future profits flowing from his intentional, continuing breach of contract by refusing to promote and service the product.

The inquiries of the courts below into restraints and injuries to competition as elements of a Section 1 Sherman Act violation are predicated upon the existence of a contract, combination or conspiracy to eliminate Rice's Michelin dealership. (3a, 7a, 11a). In this one respect, Michelin must take sharp issue with the findings of the courts below and the holdings predicated upon them. The District Court erroneously found that Duleyrie, Michelin's vice president sales, had "conceded that complaints . . . from other tire dealers . . . contributed to the decision . . . not to renew Rice's dealership." (11a). For this finding there is not a shred of evidence, even by the most forced interpretation and inference.

Further, the District Court said that "Numerous other witnesses testified that other tire dealers complained to Michelin personnel about [Rice's] activities." (*Id.*). Two Michelin salesmen testified to having heard dealer complaints about Rice. The only other testimony as to complaints about Rice came from its president, Kenneth Rice, who made two highly conflicting statements about the nature of the compaints and how he had heard of them from a Michelin employee. It requires more than competitors' complaints about another to establish the existence of a conspiracy.

Summary of Argument

Section 1 of the Sherman Act does not prohibit a manufacturer from imposing on its dealers reasonable requirements of promoting and servicing the manufacturer's product, and it does not require a manufacturer to continue to sell its product to a dealer who does not promote it and service it notwithstanding his contractual obligation to the manufacturer to do so.

Rice was a "free-rider" who sold Michelin tires without performing the promotional and servicing functions that he had agreed to perform in his DSA with Michelin. The latter's servicing requirements were reasonably necessary for the proper performance and reputation of the tire, and consequently were reasonably and directly related to interbrand competition. Rice's failure to service and promote the Michelin tire was inimical to Michelin's competitive position and its ability to attract dealers who would promote and service it, and accordingly increase interbrand competition. Michelin's decision not to renew Rice as a free-riding dealer was, therefore, not in violation of Section 1 of th Sherman Act.

Rice presented no evidence to indicate that the nonrenewal of its dealership was related to any conduct that would constitute a *per se* violation of Section 1 of the Sherman Act. Accordingly it had the burden of showing that its nonrenewal had constituted an injury to competition, but this it failed to do. The number of Michelin dealers increased tremendously in the decade of Rice's nonrenewal, and the prices of its tires actualy declined in Rice's market after Rice was no longer a Michelin dealer. Thus this case is particularly inappropriate for granting a writ of certiorari.

Rice has failed to demonstrate that the Fourth Circuit Court of Appeals adopted an analysis of the present case conflicting with the rule applied by any other Court of Appeals or by this Court. It has moreover recommended an analysis entirely inappropriate to the facts of this case.

Although this Court's so-called "two-court rule" ordinarily operates to preclude review of "concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error," exactly such

an error exists here in the finding of a combination. The District Court expressly found that Michelin's vice president in charge of sales had "conceded that complaints from . . . other tire dealers . . . contributed to the decision" not to renew Rice. (11a). There is no basis for this erroneous finding. Without it there is no evidence to support the finding of a combination. Without a contract, combination or conspiracy there can be no violation of Section 1 of the Sherman Antitrust Act. On this ground standing alone, the result reached by the courts below should be affirmed. There is no evidence to show that Rice's nonrenewal was a result of a contract, combination or conspiracy.

ARGUMENT

I. The holdings of the Courts below that the respondent's restraints on its dealers and its non-renewal of petitioner's dealership were reasonable within Section 1 of the Sherman Act are in accordance with law and fully supported by the District Court's findings.

The District Court unequivocally determined that Michelin decided not to renew Rice's dealership for legitimate business reasons, based principally on its finding that Rice was a "free-rider" on the promotional and servicing activities of other dealers. (18a). In essence, the District Court found that by deliberately withholding expenditures for a proportional share of its revenues on promotion and service, Rice was able to utilize the promotion and service facilities of other dealers as a mechanism for underwriting its own wholesaling operation and as a method for undercutting those same dealers who actually bore the expense and burden of promotion and service.

(19a). In brief, the District Court concluded: "The evidence suggested a number of ways in which plaintiff was free-riding on the promotional efforts of others." (*Id.*).

Michelin's decision not to renew Rice was necessary to inhibit potential free-riding by other dealers on the promotion and services provided by competing Michelin dealers. As the District Court observed: "Failure to impose such sanctions would induce dealers to decrease the amount of services offered in order not to be undersold by free-riding dealers." (18a).

In applying the "free-rider" rationale, the District Court made extensive and detailed findings of fact which in effect remove Michelin's decision not to renew Rice from antitrust scrutiny, in that the Court's findings substantiate the reasonableness of Michelin's non-price vertical restrictions and its nonrenewal of Rice.

First, the District Court found that "[defendant's] evidence established that plaintiff did not bear its fair share of the cost of promoting and servicing Michelin tires." (18a). These requirements of promotion and service are found in the dealer sales agreements ("DSA's") signed by Michelin dealers. (22a). They are essential elements of Michelin tires' reputation for superiority, durability and performance. As to the latter, many witnesses, both Michelin's and Rice's, testified in the District Court as to the importance of servicing to the performance of the tire. (20a-21a). To maintain and ensure the performance and reputation of Michelin tires, the DSA's signed by Rice required that the dealer "render prompt, workmanlike and courteous service with respect to Michelin Products including all services to which a purchaser of a Michelin Product from any authorized Michelin source may be entitled." (21a).

On the evidence presented to it, the District Court concluded that "Michelin had a legitimate interest in ensuring that tires were sold by dealers who could provide these specialized services." (*Id.*). The Court further stated that the evidence concerning Rice's facilities established that the volume of services performed therein was "not commensurate" with the volume of Michelin tires it sold. (*Id.*). The Court noted: "This fact was conceded to be a function of plaintiff's wholesaling activities." (*Id.*)

The District Court further buttressed the reasonableness of Michelin's promotion and service requirements with legal and economic authority to the effect that dealers will not offer point-of-sale services if they are compelled to compete with those who do not provide such services, unless manufacturers impose vertical restraints requiring them. (22a). These problems arise in markets where it is almost impossible to induce customers not to purchase products from outlets that offer the cheapest prices but no services, products which they then take to another dealer to be serviced. As to this, the District Court found that "The evidence at trial established that plaintiff's sales to unauthorized dealers were creating such problems." (22a). The main problem for Michelin was that those unauthorized dealers were not bound by Michelin DSA's obligating them to "vigorously and agressively promote the retail sales of Michelin Products." (19a). Consequently, customers who purchased Michelin tires from unauthorized dealers who were not obligated to service the tires would have to resort to authorized dealers to obtain service, a result which was greatly resented by the authorized dealers and led the District Court to conclude that free-rider problems did indeed exist. (22a).

Because of the problems created by sales to unauthorized dealers, the District Court determined that "Mich-

elin reasonably could have determined that nonrenewal of major wholesalers was necessary to insure provision of point-of-sale services" (22a-23a), and it was only to dealers with service facilities that Michelin granted DSA's. (21a). Because of Rice's immense twenty-fold expansion of its business through wholesaling (7a), the District Court found that by the time of its nonrenewal, its services were no longer "commensurate with the volume of Michelin tires [it] sold." (21a). In the context of increasing competition from other tire manufacturers, Michelin's concern for the promotional efforts of its dealers was acute, and ultimately led to a change in its discount policy to require an expenditure of three percent in advertising to entitle a dealer to a quantity discount. (20a).

By disregarding its promotional and service obligations under its DSA, Rice jeopardized Michelin's legitimate business interests and compelled its decision not to reappoint Rice.* *See Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 54-57 (1977); *see also Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126, 132 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978). In fact, it is broadly recognized that the elimination of "free-riding" dealers such as Rice would promote, not suppress, competition. *See Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. at 55; *State* v. *Lawn King, Inc.*, [1979-2] Trade Cas. (CCH) ¶ 62,800, at 78,656 (N.J. Super. Ct. App. Div. 1979);

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*Even if, contrary to the evidence, Michelin had adopted a policy of never selling to wholesalers, this would be legal under the antitrust laws. *See United States* v. *Colgate & Co.*, 250 U.S. 300 (1919); *Aladdin Oil Co.* v. *Texaco, Inc.*, 603 F.2d 1107, 1114-15 (5th Cir. 1979) (extensive discussion of Colgate doctrine and cases applying it); *see also* the "avalanche of precedents" cited in *GTE Sylvania Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977) (manufacturer may grant exclusive retail distributorship).

see also Posner, The Rule of Reason and the Economic Approach, 45 U. Chi. L. Rev. 1, 12, 19-20 (1977); R. Posner, Antitrust 554-55 (1974); R. Posner, Antitrust Law: An Economic Perspective 148-50 (1976).

The Court of Appeals for the Fourth Circuit unanimously agreed with these abundant and incontestable findings of fact by the District Court, holding that "the restraints were for the purpose of promoting interbrand competition" and thus reasonable within Section 1 of the Sherman Act. (3a). This Court should not disturb the decision of the Fourth Circuit, which was based on facts that lead to the inescapable conclusion that the restraints imposed by Michelin and its decision not to reappoint Rice were reasonable.

As this Court has previously stated:

> A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Manufacturing Co. v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *see also, Branti* v. *Finkel*, 445 U.S. 507, 526 n. 6 (1980):

> In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the District Court and the Court of Appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous.

Accordingly, the granting of certiorari is inappropriate.

II. The petition should be denied because petitioner failed to meet its burden of showing that nonrenewal of its dealership had an anticompetitive effect.

In order to prevail in any antitrust action, the plaintiff must substantiate an antitrust injury, "which is to say injury of the type the antitrust laws were intended to prevent. . . ." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 490 (1977). In order to prove an antitrust violation arising from vertical restraints, the plaintiff must satisfy the rule of reason standard. As the Fifth Circuit noted:

> [The] rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification.

Kestenbaum v. *Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), *citing United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 380-82 (1967), *overruled in part, Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). After applying the rule of reason test, the District Court expressly found that Rice totally failed to demonstrate an adverse effect on either intrabrand or interbrand competition in the passenger or truck tire market. (26a-27a).

Although it relied on statistical figures for the national market in determining whether Michelin had "market power," the initial inquiry in a rule of reason case, the District Court found the relevant geographic market to be the Baltimore-Washington area. (16a, 26a). The District Court found that Michelin did not have market

power based on testimony that Michelin's share of the national radial passenger tire market was 7.9% in 1977 and its share of the national radial truck tire market was approximately 20-25%. (26a). The Court found no anticompetitive effect on retail prices or intrabrand competition in the Baltimore-Washington market stemming from Michelin's dealer requirements. (27a). In sum, the District Court determined (28a):

> [T]he vertical restraints imposed by Michelin were reasonably necessary to meet the fierce competition from other producers of radial tires and the plaintiff failed to show that Michelin's change in distribution strategies had adverse impacts on intrabrand competition.

In determining that Michelin did not possess market power, the District Court followed recognized antitrust guidelines. A review of the District Court's opinion indicates that it based its analysis on market share, competitive conditions and prices, before and after the conduct of which Rice complained. *See Board of Trade of City of Chicago* v. *United States,* 246 U.S. 231, 238-39 (1918); *see also H&B Equipment Co.* v. *International Harvester Co.,* 577 F.2d 239, 243 (5th Cir. 1978); *Northwest Power Products, Inc.* v. *Omark Industries Inc.,* 576 F.2d 83, 89 (5th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979); *Oreck Corp.* v. *Whirlpool Corp.,* 579 F.2d 126, 130 n.5 (2d Cir.) *cert. denied,* 439 U.S. 946 (1978); *Kestenbaum* v. *Falstaff Brewing Corp.,* 575 F.2d 564, 572 (5th Cir. 1978), *cert. denied,* 440 U.S. 909 (1979).

The District Court's finding that Rice failed to demonstrate any anticompetitive effects of its termination was based on ample evidence of continuing dealer competition both at the wholesale and retail level, which could

not be surmounted by the "impressionistic" evidence offered by Rice that dealers who bought from it reduced their retail prices. (27a).

In the well-known words of Chief Justice Warren, the antitrust laws were enacted for "the protection of *competition,* not *competitors.*" *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962) (emphasis in original). Rice completely failed to meet its burden to produce any evidence establishing any anticompetitive effect in the relevant market due to Michelin's non-price vertical restraints, a failure duly recognized by the District Court (27a) and the Fourth Circuit. (2a). This simple finding of fact, that there was no anticompetitive effect resulting from Michelin's restraints or nonrenewal of Rice, renders any further analysis by this Court in this rule of reason setting unnecessary and judicially uneconomical, and so obviates certiorari.

III. The authorities relied upon by the petitioner fail to show that the Court of Appeals' decision is "in conflict with the decision of another federal Court of Appeals," nor does the petitioner claim or show that the decision of the Court of Appeals in any other respect calls "for an exercise of this Court's power of supervision".

In an attempt to circumvent the lower courts' findings of fact, Rice asks this Court to review and find illegal *per se* conduct already closely examined by the District Court and determined to be anticompetitive in neither purpose nor effect. (21a-23a, 27a-28a). Rare indeed is the case where conduct genuinely fit for *per se* categorization is scrutinized and found benign, since "a per se rule reflects the judgment that such cases are not suffi-

ciently common or important to justify the time and expense necessary to identify them." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51 n. 16 (1977).

The District Court found that Michelin had decided to handle its wholesaling primarily by itself. (9a). While it is surely unclear why such a decision by a manufacturer, even if taken in "concert" with several dealers, is so inevitably anticompetitive, petitioner urges that the Court's intervention is necessary to resolve a conflict, supposedly created by the decision below, with this Court's decisions and with those of other circuits. (7-9).

To begin with, the resolution Rice advocates would create rather than eliminate conflict with the Supreme Court cases. Rice would have this Court require "horizontal" analysis for non-price resale restrictions wherever a manufacturer distributes to both retailer and wholesaler, regardless of the purpose or effect of the restriction or the nature of the "combination" involved. (*See* 7, 13).

United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *overruled in part, Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), concerned mixed or "dual" distribution, and there the Court flatly stated "These are *not* horizontal restraints . . .," 388 U.S. at 372 (emphasis added), and pursued vertical analysis throughout its opinion. That much of the *Schwinn* holding, at least, was respected in the subsequent *Sylvania* decision, 433 U.S. 36, 52 n. 18, and there is no reason to disturb that analysis now.*

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* *See also White Motor Co.* v. *United States*, 372 U.S. 253 (1963) in which the Court treated the restraints as vertical despite a government contention (Brief for the United States at

(Footnote continued on following page)

Moreover, there is no reason to believe disturbing the *Schwinn/Sylvania* approach would affect the outcome of the present case. It should not be assumed that once any facet of a relationship can be characterized as "horizontal," *per se* analysis is mandatory. While in many contexts, "horizontal" and *per se* go together, it is certainly not universally so. There is certain conduct illegal *per se, e.g.*, price-fixing, group boycotts, etc., and it is usually horizontal in nature. But it does not follow that any arrangement with a horizontal aspect is therefore within one of the proscribed categories. Thus, for example, a non-competition covenant ancillary to the formation of a business partnership, while thoroughly horizontal and obviously "anticompetitive" in a sense, is not solely anticompetitive and is evaluated under the rule of reason. *Newburger, Loeb & Co.* v. *Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977). *See also Broadcast Music,*

(Footnote continued from preceding page)

10) that "dual" aspects of the defendant's distribution system made a horizontal approach appropriate. As William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, recently observed:

> The mere fact that a manufacturer achieves a portion of its distribution through wholly-owned channels does not, by that factor alone, convert a vertical case into a horizontal one. A manufacturer may employ dual channels of distribution for a variety of purposes, and only in unusual circumstances does it comport with commercial realities to regard the manufacturers' distribution activities as representing effective horizontal competition with the independent distributor network.

Announcements made by Antitrust Division of the United States Department of Justice on July 8, 1981, TRADE REG. REP. (CCH) No. 498, at 2 (July 13, 1981).

Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). Petitioner suggests the presence here of only one such *per se* practice, a horizontal customer allocation scheme. (3, 5). But in support of this characterization it cites only *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), a case totally dissimilar to this one. In *Topco* it was the conspirators themselves whose relationship was horizontal. The anticompetitive agreement as well as the resulting "restraints" were by design horizontal in purpose and effect. The vertical participant in *Topco* was simply a creature of the horizontal conspiracy, hardly a claim that can be made about Michelin.

Rice, however, argues that this Court's intervention is required because there are what it says are three conflicting tests applied to distinguish what is "horizontal" from what is "vertical": a "source test" (attributed to the Fifth Circuit), a "purpose test" (attributed to the Fourth Circuit) and a "competitive relationship test" (attributed to the Second and Third Circuits and to this Court). (8-9). In point of fact, the "source test" and "purpose test" as applied by the Fourth and Fifth Circuits do not conflict, and the independent "competitive relationship test" expounded by Rice does not (and should not) exist.

The Court below is credited by Rice with having "invented a unique "purpose test." (9). But the Court of Appeals did no such thing. It merely cautioned against any extreme application of the District Court's decision, and, with that "clarification," affirmed "on the basis of [the district] court's searching and well reasoned opin-

ion." (3a).* The clarification was based upon a passage in *Schwinn*, 388 U.S. at 372-73, which in turn was based upon *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). In *General Motors* a pre-existing combination of dealers had enlisted a manufacturer to act as its enforcement agent in a price-fixing conspiracy aimed at throttling retail price competition. The dealer proposed action was immediately enforced by the manufacturer, but its true "source," if that term is appropriate at all, was the dealer conspiracy. This distinction was recognized in *Sylvania*, 433 U.S. 36, 59 n. 28 (citing *General Motors*). Whether "purpose" is looked upon as an aid in locating the actual "source" or whether different verbal formulations altogether are used, Rice has failed to show choices of inconsistent analyses leading to conflicting decisions, as opposed to merely differing choices of words.** The Fifth Circuit's language that petitioner quotes from *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981) (10) cannot be read to reject the common approach adopted by *Schwinn*, *Sylvania* and

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* The Court of Appeals never indicated that it would have followed analytical steps different from those followed by the District Court. Its opinion only suggests that it might have labelled identical analytical steps as inquiry about the applicability of the *per se* doctrine rather than as steps in applying the rule of reason. The District Court did not fail to recognize that possibility (12a).

** Rice suggests (9 n. 7) that *Westpoint Pepperell, Inc.* v. *Rea*, [1980-2] Trade Cas. (CCH) ¶ 63,341 (N.D. Cal. 1980), and *Krehl* v. *Baskin-Robbins Ice Cream Co.*, [1979-2] Trade Cas. (CCH) ¶ 62,806 (C.D. Cal. 1979), represent "yet another approach." This "approach" too, of course, is one petitioner opposes, and a reading of the cases indicates neither analysis nor result conflicting with the holdings of the Fourth and Fifth Circuits.

the Court below, given the issues in *Red Diamond* and the Fifth Circuit's acknowledgment that

> occasionally dealers may agree among themselves to have their supplier "impose" restrictions upon them so that an ostensible vertical restraint is in reality a horizontal cartel.

Muenster Butane, Inc. v. *Stewart Co.*, 5 TRADE REG. REP. (CCH) ¶ 64,163 n. 7 (5th Cir. 1981); *see also, Red Diamond*, 637 F.2d at 1005.

To lend the law a chaotic look, petitioner has also concocted a "competitive relationship" test. But it is based upon cases legally irrelevant and factually dissimilar to the one at bar. Two of petitioner's authorities are from the fair trade context. Here the courts merely decide that special statutory protection for resale price-fixing schemes (otherwise illegal regardless of vertical or horizontal characterization) should not be expanded beyond the plain meaning of the statutory text by virtue of some allegedly implicit functional analysis. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *Rubbermaid, Inc.* v. *Federal Trade Commission*, 575 F.2d 1169 (6th Cir. 1978). Two other cases that petitioner cites predate *Sylvania*, rest primarily upon the overruled portion of *Schwinn* and concern clearly defined territorial allocations where the defendant and the plaintiff operated at the same level of distribution as the defendant's co-conspirators: *Pitchford* v. *PEPI, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *Interphoto Corp.* v. *Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y.) (*Interphoto* also involved price-fixing), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969) (the horizontal-vertical question was not before the Sec-

ond Circuit in *Interphoto*).* *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), another pre-*Sylvania* case Rice relies upon, did not consider the "dual distribution" question except as linked to a contractual ban on *inter*brand competition. *Id.* at 1253-54. In *United States* v. *CIBA GEIGY Corp.* [1976-1] Trade Cas. (CCH) ¶ 60,908 (D.N.J. 1976), (also pre-*Sylvania*), the defendant again operated at the same level of distribution as its co-conspirators, and, in any event, the court there found a design and intention to suppress horizontal competition (a possibility the fact-finder rejected in the present case (28a)) through defendant drug patentee's misuse of its monopoly position.

Particularly inappropriate are petitioner's citations to *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) and *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967). The observations made above in connection with *Topco* (p. 17, *supra*) hold for *Sealy* as well. Both vertical participants, Topco and Sealy, were owned and controlled by the independent distributors with whom they combined. These cases do not call for a result different from the one the Fourth Circuit reached in the instant case, nor can their standards, based upon different factual premises, at all be said to conflict with those invoked by the Court below.

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* A district court opinion cited by petitioners, *Copy-Data Systems, Inc.* v. *Toshiba America, Inc.*, [1979-1] Trade Cas. (CCH) ¶ 62,696 (S.D.N.Y. 1979), does not contain the full explanation of its legal reasoning. *Id.* at 77,900 n. 1. The trial transcript reveals that the judge condemned the dual distributor's restrictions because he found that the restrictions were merely attempts to insulate the dual distributor from competition. Trial Tr. at 559-60. The District Court found in this case, however, that Rice's nonrenewal stemmed from Michelin's desire to insure adequate promotion and point-of-sale services for its tires. (17a-24a, 28a). Moreover, it appears that in Toshiba, a predatory defendant intentionally drove the plaintiff into bankruptcy.

Finally, Rice contends (12-14) that denial of certiorari in this case threatens the underpinnings of all *per se* rules. (Its arguments on that point can be sufficiently answered by reference to *Sylvania* generally and to footnotes 16 and 18 of that opinion particularly.) What petitioner does not consider, however, is that adoption of its position would destroy—for any manufacturer engaged in "dual distribution"—the heretofore settled right* of a manufacturer to replace one distributor with another for legitimate business reasons. "A" is a dual distributor; "A" asks "B" if he would be interested in replacing "C," a sluggish and inefficient wholesaler, and "B" agrees. There is now a "combination" according to petitioner. There is also, under petitioner's analysis, a *per se* violation of the Sherman Act due to the "competitive relationship" between "A," the dual distributor, and "C." Any inquiry into the "purpose" of "C"'s replacement is forbidden under petitioner's theory. Respondent believes this result is self-evidently fallacious and, consequently, unworthy of this Court's attention.

Rice's position demonstrates the danger of the "formalistic line-drawing" this Court has cautioned against in the past. The critical question is not whether conduct might somehow be thought of as coming within the literal terms of the shorthand expression used to describe some *per se* practice. The critical question is whether the conduct is of a kind experience has shown to be irredeemably anticompetitive. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (blanket licensing of musical compositions price-fixing in name

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* *E.g., Byars* v. *Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979); *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). *See also Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

only); *White Motor Co.* v. *United States,* 372 U.S. 253 (1963) (factual investigation should reveal thoroughly anticompetitive nature before new *per se* category added). Clearly the rule Rice propounds reaches beyond such conduct. Not only has it failed to show genuine conflicts among the circuits, but its proposed inflexible rule is the most unsatisfactory "resolution" possible, particularly on the facts of free-riding found below. This case is not a persuasive candidate for a writ of certiorari.

IV. The District Court's holding that "a combination existed for the purposes of § 1 [of the Sherman Act] between [the respondent] and some of its authorized dealers" is deviod of foundation in the evidence and without suport in law.

In order to reach its conclusion that Michelin's decision not to renew Rice's dealership did "not constitute unilateral action escaping scrutiny under § 1" (7a), the District Court found that

> Jean Pierre Duleyrie, [Michelin's] Vice-President in charge of sales, and the individual primarily responsible for the nonrenewal decision conceded that complaints from . . . other tire dealers about plaintiff's geographically extensive and large-scale wholesaling activities contributed to the decision.

(11a). For this finding there is not a word of supporting evidence. Mr. Duleyrie said nothing of the kind (A 83-87*). The only testimony ever advanced to support this finding is a totally erroneous and unfounded remark in the testimony of Kenneth Rice, petitioner's president:

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* "A" refers to pages in the joint appendix before the United States Court of Appeals for the Fourth Circuit.

> We have first-hand knowedge that dealers have been complaining from Mr. Duleyrie's Deposition. . . .

(A 552). Nowhere in Mr. Duleyrie's deposition did he make any such statement. Petitioner neither included the transcript of the Duleyrie deposition in the appendix to its appeal below, nor did it even attempt to document its president's assertion as to Duleyrie's alleged statement, which Duleyrie never made. There is no evidence that complaints by Michelin dealers about Rice contributed to its nonrenewal. Although there were isolated, vague and generalized dealer complaints about unspecified activities of Rice, there is no evidence that reports of these complaints ever made their way to Michelin management or entered into its decision not to reappoint Rice because it was a free-rider.

As the United States District Court for the Eastern District of Pennsylvania recently held in the course of a careful and detailed analysis, it requires more than evidence of competitors' complaints to establish the existence of a combination or conspiracy. In *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 478 F. Supp. 243 (E.D. Pa. 1979), *aff'd*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 101 S.Ct. 1981 (1981), a gasoline dealer whose agreement with Texaco had terminated, brought charges against it of price-fixing and other allegedly unlawful restrictions. The plaintiff's evidence showed that "some Texaco retailers had complained to Texaco that Sweeney's policy of discount pricing was hurting their sales." *Id.* at 255. A former Texaco employee testified he "thought" the termination was due to Sweeney's pricing policy.

On defendant's motion for a directed verdict, the district judge held that:

> To find that Sweeney had introduced sufficient evidence to allow the jury to conclude that Texaco had conspired with other Texaco retailers to fix the retail price of Texaco gasoline I would have to find that competitors' complaints, without more, permit an inference of concerted action. Like numerous courts before me, I hold that evidence of competitors' complaints standing alone cannot support a finding of liability under § 1 of the Sherman Act. *Westinghouse Electric Corp.* v. *CX Processing Laboratories,* 523 F.2d 668 (9th Cir. 1975); *Klein* v. *American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963); *Carr Electronics Corp.* v. *Sony Corp. of America,* 472 F. Supp. 9 (N.D. Cal. 1979); *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.,* 289 F. Supp. 584 (S.D.N.Y. 1968).

Id. (footnote omitted).

The genesis of the *Sweeney* court's holding is found in its citation to *Carbon Steel Products Corp., supra,* where the court stated:

> A combination violative of Section 1 of the Sherman Act cannot be implied from the fact that some of Wood's customers complained of Carbon Steel's practices, since it was the normal working of the marketplace for them to have done so.

289 F. Supp. at 588.

It is of course fundamental that there cannot be a violation of Section 1 of the Sherman Antitrust Act unless there is a contract, combination or conspiracy. Here there is none, and for that reason alone, entirely apart from all other considerations, the decisions of the court below

should be affirmed. Nothing in the facts of the case, the decisions of the federal courts nor common sense itself suggest good ground for review of the Fourth Circuit's decision. Certiorari should be denied.

CONCLUSION

The Court of Appeals' affirmance of the judgment entered in the District Court is in accordance with the law and fully supported by the findings of fact of the District Court. The petition for a writ of certiorari fails to demonstrate any error or conflict of decision warranting review by this Court, and should therefore be denied.

Respectfully submitted,

ROBERT P. KNAPP, JR.
RAYMOND L. HERBERT
135 West 50th Street
New York, New York 10020
(212) 974-1000
Counsel for Respondent

Of Counsel:

KEVIN S. FOGARTY
STEPHEN D. RYAN III
LOWE & KNAPP
135 West 50th Street
New York, New York 10020
(212) 974-1000

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No. 81-154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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v.

MICHELIN TIRE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

TIMOTHY J. WATERS
ROBERT H. MORSE
GLENN R. REICHARDT
JEFFREY N. MARTIN
PEABODY, RIVLIN, LAMBERT & MEYERS
A Professional Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 457-1000

GEORGE W. SHAFFER
WILLIAM N. ROGERS
SHAFFER & ROGERS
17 West Jefferson Street
Rockville, Maryland 20850
(301) 279-2100
Counsel for Petitioner

September 11, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONER

Petitioner Donald B. Rice Tire Company, Inc. ("Rice") respectfully submits this reply to the brief of respondent Michelin Tire Corporation ("Michelin").

As a general matter, Rice must note that Michelin's brief virtually ignores the first issue before this Court: whether this Court need define the appropriate antitrust standard by which to judge restraints of trade in a dual distribution context. Nor does Michelin's recitation of selective findings of the District Court advance resolution of the second question presented: whether legal propositions announced by the Court of Appeals for the Fourth Circuit conflict with the holdings of this Court or of other Circuit Courts of Appeal. Importantly, Michelin's brief does not dispute the importance of resolving that conflict, but apparently seeks to embroil this Court in a *de novo* review of facts.[1]

[1] Despite its unimportance to the issues raised in the petition, at least one of Michelin's mischaracterizations of the facts found below warrants a response. Neither the District Court nor the

Michelin's brief notwithstanding, this petition does not turn upon factual conflicts. Unlike Michelin, which mounts a lengthy attack upon the District Court's findings (Brief for Respondent at 5, 6-7 and 22-25), Rice accepts the facts found below.[2] Rice questions only the propriety of the legal standard applied by the Court of Appeals for the Fourth Circuit. The primary question presented is not the ultimate reasonableness or unreasonableness of the termination of Rice as a Michelin dealer, but what analytical framework a court should employ to assess the antitrust legality of such a termination. The issue framed for this Court is whether the Court below erred by holding that restraints imposed by a manufacturer upon a competing distributor in a dual distribution system should be characterized mechanically as "vertical" restraints and analyzed solely under the Rule of Reason.

This Court has acknowledged the difficulty of differentiating horizontal from vertical restraints of trade. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57 n.28 (1977). Michelin abruptly dismisses, as no more than semantics, the distinct analyses employed by

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Court below found that Rice made a "flagrant" decision to disregard "deliberately" or to "flatly refuse to perform" its contractual obligations under the Michelin Dealer Sales Agreement ("DSA"). (Brief for Respondent at 3, 4 and 7). A careful examination of the opinions below reveals that neither the District Court nor the Court of Appeals found that Rice breached its contract with Michelin.

Rice reserves other responses to Michelin's mischaracterization of the facts for its brief on the merits should this court grant the petition.

[2] While Michelin takes issue with certain factual findings, it conspicuously avoids discussion of the most significant finding. Michelin's primary reason for terminating Rice was to seize the wholesaling business that Rice, with Michelin's knowledge and encouragement, built for itself over the years. (Petition, App. D at 9a-10a).

this Court and other courts in making the horizontal/vertical distinction. (Brief for Respondent at 18). However, courts and legal commentators agree that "differing choices of words" can lead to different results. *See, e.g.*, Altschuler, *Sylvania, Vertical Restraints and Dual Distribution*, 25 ANTITRUST BULL. 1 (Apr. 1980), and other authorities cited in Petition at 6 n.3. In the present case, the Courts below employed the wrong "choice of words" and, Rice submits, reached the wrong result.

In sum, Michelin's brief does not seriously address the confusion and conflict in an important area of antitrust law—restraints in a dual distribution context. Only this Court can clarify the law by returning the lower courts to the earlier analysis of restraints adopted by this Court in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 313 (1956), and reaffirmed in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972).

Respectfully submitted,

TIMOTHY J. WATERS
ROBERT H. MORSE
GLENN R. REICHARDT
JEFFREY N. MARTIN
PEABODY, RIVLIN, LAMBERT & MEYERS
A Professional Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 457-1000

GEORGE W. SHAFFER
WILLIAM N. ROGERS
SHAFFER & ROGERS
17 West Jefferson Street
Rockville, Maryland 20850
(301) 279-2100
Counsel for Petitioner

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